Supreme Court, U. S.
FILED
MAR 24 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

NO. 75-1365

JACK R. WHEELER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOSEPH A. VARON
2432 Hollywood Boulevard
Hollywood, Florida 33020

Attorney for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

TOPICAL INDEX

	Page
JUDGMENT AND OPINION OF THE COURT BELOW	2
JURISDICTION OF THIS COURT	2
QUESTIONS PRESENTED FOR REVIEW	3
CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS RELIED UPON FOR ALLOWANCE FOR THE WRIT	5

I

The identical question of law based on identical facts is presently under consideration by this Court in the case of UNITED STATES v. MANDUJANO, U. S. Supreme Court Case No. 74-754, where this Court granted Certiorari on March 24, 1975.

II

Where Petitioner was called as a Grand Jury Witness upon an investigation focused upon him to such an extent that he was a "virtual" or "putative" defendant, for the purpose of obtaining incriminatory or perjurious testimony, and not given warnings or advice of any kind prior to his Grand Jury testimony, there was a violation of fundamental fairness as to amount to a denial of due process.

CONCLUSION	8

INDEX TO APPENDICES

		Page
Appendix A.	Final Judgment of the Supreme Court of Florida	1-2
Appendix B.	Order of the Supreme Court of Florida	3
Appendix C.	Order of District Court of Appeal of Florida, Fourth District	4-11
Appendix D.	Order of Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida	12-13
Appendix E.	Provisions of the Fifth Amendment to the United States Constitution and the Fourteenth Amendment to the United States Constitution	14

TABLE OF AUTHORITIES CITED

Case	Page
STATE ex rel. LOWE v. NELSON, 210 So.2d 197	6
UNITED STATES v. MANDUJANO, 496 F.2d 1050	6
UNITED STATES v. MANDUJANO, United States Supreme Court Case No. 74-754	5, 6, 7, 8

in the

Supreme Court

of the

United States

NO. _____

JACK R. WHEELER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Jack R. Wheeler, prays that a Writ of Certiorari issue to review a final judgment and order of the Supreme Court of the State of Florida entered on

February 26, 1976 (Appendix A and B, infra), which by its denial of the Petition for Certiorari upheld an order of the District Court of Florida, Fourth District, entered on April 25, 1975 (Appendix C, infra), affirming a judgment of conviction rendered against Petitioner in the Circuit Court of Broward County, Florida, convicting Petitioner of the crime of perjury.

JUDGMENT AND OPINION OF THE COURT BELOW

In the order of the Supreme Court of Florida entered on February 26, 1976 (set out in Appendix A and B attached to this Petition) the Court rendered no opinion and gave no reasons for its denying Petitioner's Application for Certiorari.

In its original opinion of April 25, 1975, the District Court of Appeal of Florida, Fourth District, affirmed the judgment of conviction rendered against Petitioner in the Circuit Court of Broward County, Florida, convicting Petitioner of the crime of perjury (set out in Appendix C).

JURISDICTION OF THIS COURT

1. The date of judgment to be reviewed was entered by the Supreme Court of Florida on February 26, 1976 (Appendix B).

This Petition is filed within 90 days of said order.

2. The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S. Code, Sec. 1257(3) and Rule 22(1) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

Was not the Petitioner deprived of his right to protection under the Fifth Amendment of the Constitution as made applicable to the State of Florida by the Fourteenth Amendment when:

(a) Petitioner was called as a Grand Jury witness upon whom investigation was focused to such extent that he was a "virtual" or "putative" defendant and was not given full Miranda warnings prior to his testimony; and,

(b) The trial court refused to suppress Petitioner's Grand Jury testimony, although conceding Petitioner to be a "putative defendant" who had received no warnings of any kind prior to his giving Grand Jury testimony which resulted in a subsequent perjury prosecution.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution
Fourteenth Amendment, United States Constitution

(The pertinent provisions are set out in Appendix E of this Petition.)

STATEMENT OF THE CASE

Petitioner, Jack R. Wheeler, was subpoenaed as a witness before the Broward County Grand Jury and gave testimony which resulted in a perjury Indictment. At the pretrial level Petitioner moved to suppress his Grand Jury testimony because the investigation had focused upon him to such an extent that he was a "virtual or putative defendant", and should have been given full Miranda warnings prior to his giving testimony.

At the suppression hearing the prosecutor who conducted the Grand Jury proceedings conceded that he focused his interrogation on Petitioner, and the trial judge made a specific finding in his order that the prosecutor regarded Petitioner as a putative defendant to a charge of malfeasance but not perjury during his Grand Jury testimony. Petitioner's Motion to Suppress Grand Jury testimony was denied (Appendix D).

Petitioner was found guilty of perjury and sentenced to three years imprisonment.

Petitioner's appeal to the District Court of Appeal of Florida, Fourth District, was affirmed (Appendix C). Application for Certiorari was filed by Petitioner in the Supreme Court of Florida which was denied (Appendix A and B).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The identical question of law based on identical facts is presently under consideration by this Court in the case of *United States v. Mandujano*, U.S. Supreme Court Case No. 74-754, where this Court granted Certiorari on March 24, 1975.

2. Where Petitioner was called as a Grand Jury Witness upon an investigation focused upon him to such an extent that he was a "virtual" or "putative" defendant, for the purpose of obtaining incriminatory or perjurious testimony, and not given warnings or advice of any kind prior to his Grand Jury testimony, there was a violation of fundamental fairness as to amount to a denial of due process.

Petitioner in the case at Bar had sought to suppress his Grand Jury testimony, which was the basis of his perjury Indictment, and the sole thrust of said motion was that the Grand Jury investigation had focused upon him to such an extent that he was a "virtual or putative defendant" and should have been given full Miranda warnings prior to his giving testimony. In denying Petitioner's Motion to Suppress Grand Jury Testimony the trial judge recognized that the prosecutor had focused his Grand Jury interrogation on Petitioner, and made a specific finding Petitioner was regarded as a putative defendant to a charge of malfeasance but not perjury, during the Grand Jury testimony.

Petitioner relied heavily upon the case of *United States v. Mandujano*, 496 F.2d 1050 (5 CA, 1974), but notwithstanding the trial court denied Petitioner's Motion to Suppress Grand Jury Testimony (Appendix D).

In *Mandujano* the defendant was warned that he would not be required to answer questions of an incriminatory nature. (In the case *sub judice* there was no warning or advice of any kind given.) *Mandujano*, as here, filed a pretrial Motion to Suppress Grand Jury Testimony, which was granted by the District Judge, holding that a "putative" defendant who was called before a Grand Jury for the purpose of obtaining incriminatory or perjurious testimony was a violation of fundamental fairness as to amount to a denial of due process.

On appeal by the Government the Fifth Circuit Court of Appeals for the United States affirmed the action of the District Court in suppressing Mandujano's testimony in 496 F.2d 1050 (5 CA, 1974); Rehearing and Rehearing en banc was denied October 16, 1974. The Government thereafter filed a Petition for Certiorari to this Court, which was granted on March 24, 1975, in Case No. 74-754 which is still pending.

In addition to the pronouncements made by the Fifth Circuit Court of Appeals in *United States v. Mandujano*, supra, the Supreme Court of Florida in the case of *State ex rel. Lowe v. Nelson*, 210 So.2d 197 (1968), at page 199 of that opinion stated the following:

> "Therefore, at trial in the prosecution of Petitioner, if it appears incriminating testimony was taken from him in the grand jury room and such

> testimony is sought to be introduced, it may be found inadmissible on timely objection his Miranda requirements were not complied with as a predicate to taking such testimony. *Petitioner was entitled to the Miranda warnings if he became the criminal target of the grand jury interrogation.* He also should have been advised of his right to counsel to represent him and, if not intelligently declined, he should have had counsel beside him in the grand jury room to advise him when he testified."
>
> (Emphasis ours)

Petitioner in the case *sub judice* is of the opinion that the ruling of this Honorable Court in *United States v. Mandujano*, supra, will be dispositive of the issues presented by Petitioner.

CONCLUSION

We submit that since the facts and questions of law involved in Petitioner's claim are almost identical with those issues in *United States v. Mandujano*, supra, which is presently being considered by this Court, the two cases should be considered in tandem.

We pray that Your Honors will grant the Writ of Certiorari in similar measure as that of *United States v. Mandujano*, United States Supreme Court Case No. 74-754.

Respectfully submitted,

JOSEPH A. VARON
2432 Hollywood Boulevard
Hollywood, Florida 33020
Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, 1976

THURSDAY, FEBRUARY 26, 1976

CASE NO. 47,360

JACK R. WHEELER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing filed by petitioner,

IT IS ORDERED that said petition is denied.

ROBERTS, OVERTON, ENGLAND, SUNDBERG AND HATCHETT, JJ., CONCUR ADKINS, C.J., AND BOYD, J., DISSENT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y
CC: Hon. E. J. Comiskey, Clerk
Hon. Clyde Heath, Clerk
Hon. James M. Reasbeck, Judge
Hon. Joseph A. Varon
Hon. Robert L. Shevin,
Hon. George Georgieff
Hon. Thomas M. Carney
West Publishing Company

APPENDIX B

[TITLE OMITTED]

The Motion to Stay Mandate filed by petitioner is hereby granted and proceedings in this Court and in the District Court of Appeal, Fourth District and in the Circuit Court in and for Broward County, Florida are hereby stayed to and including March 29, 1976 to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y
CC: Hon. E. J. Comiskey, Clerk
Hon. Clyde Heath, Clerk
Hon. James M. Reasbeck, Judge
Hon. Joseph A. Varon
Hon. Robert L. Shevin,
Hon. George Georgieff
Hon. Thomas M. Carney

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1975

CASE NO. 74-449

JACK R. WHEELER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed April 25, 1975.

Appeal from the Circuit Court
for Broward County;
James M. Reasbeck, Judge.

Joseph A. Varon of Varon, Stahl
and Kay, Hollywood, for appellant.

Robert L. Shevin, Attorney General,
Tallahassee, and Thomas M. Carney,
Assistant Attorney General, West
Palm Beach, for appellee.

DOWNEY, J.

For many years appellant has been a public official in Broward County. On September 26, 1973, the Broward

County grand jury indicted appellant for perjury in connection with testimony he gave before the grand jury during its investigation of the conduct of appellant's public office.

Appellant testified before the grand jury that in February 1969 appellant and his wife entered into a written employment contract pursuant to which his wife would work in his office for a period of five years at a specified annual salary. Appellant identified a written document presented to him as the contract in question. The indictment in question charged that appellant committed perjury when he gave the foregoing testimony because he knew it was false and because it pertained to a material matter the grand jury was investigating, namely, appellant's employment of his wife while he was a public official. Appellant was tried by a petit jury, convicted of perjury and sentenced to three years imprisonment.

Appellant suggests five points requiring reversal, only three of which require comment: (1) he was not advised of his constitutional rights before testifying before the grand jury; (2) the indictment was invalid because more than one assistant state attorney appeared simultaneously before the grand jury while testimony was being adduced; (3) the state failed to prove the allegedly false testimony was material to the grand jury inquiry.

Under point one appellant complains that he was not advised of the nature of the grand jury's inquiry, nor was he given any Miranda warnings prior to testifying. However, this point is without merit. A witness testifying before a grand jury or prosecuting attorney does not have

a right to be advised of the nature of the inquiry before testifying. Dinnen v. State, Fla.App. 1964, 168 So.2d 703; In re Black, 47 F.2d 542, (2nd Cir. 1931); United States v. Schaier, 175 F.Supp. 838, 842 (S.D.N.Y. 1959). Nor is a witness appearing before a grand jury entitled to the usual Miranda warnings. State ex rel. Lowe v. Nelson, Fla.App. 1967, 202 So.2d 232, affirmed Fla. 1968, 210 So.2d 197.

Appellant's second point that the indictment was defective because several assistant state attorneys simultaneously attended the grand jury during presentation of testimony was based upon the construction the District Court of Appeal, First District, placed upon §§ 905.17 and 905.19, F.S. in State ex rel. Christian v. Rudd, Fla. App. 1974, 302 So.2d 821. However, the Supreme Court rejected that interpretation of §§ 905.17 and 905.19, F.S. 1973, and held that said sections authorized the presence of more than one qualified assistant state attorney to be present at grand jury sessions. Rudd v. State ex rel. Christian, Fla. 1975, ___ So.2d ___, opinion filed February 10, 1975. Thus, it appears appellant's second point is ill-founded.

Appellant's third point is more troublesome. By appropriate assignments of error and argument in his brief, appellant contends that the evidence adduced at trial was insufficient for the petit jury trying the case to determine whether appellant's grand jury testimony was material to the grand jury inquiry.

The law is well established in this jurisdiction that one of the essential elements of the crime of perjury is that the false testimony must be on a material point. 25

Fla. Jur:, Perjury, §6. In the case of false testimony before a grand jury, the testimony must be material to the subject matter about which the grand jury is inquiring. Gordon v. State, Fla. 1958, 104 So.2d 524, 530-531. Accordingly, the indictment must explicitly describe the matter which was being investigated by the grand jury, and as to which the witness was testifying when he gave the false testimony. 25 Fla. Jur., Perjury, §29. As with other essential elements of any crime, the state must at the trial of the perjury charge prove the materiality of the false testimony. Unlike the essential elements of other crimes, the determination of whether materiality has been sufficiently proven is generally a question of law for the court. Wolfe v. State, Fla. 1972, 271 So.2d 132.

In the case at bar the trial judge submitted the question of materiality to the jury upon appropriate instruction for their decision even though in this case, there being no evidentiary conflict, it was a question of law for the court. The jury by its verdict obviously found appellant's testimony was material to the grand jury's inquiry. Appellant is hardly in a position to complain about the court's submission of the materiality issue to the jury because, as Judge Cowart noted in Wilson v. State, Fla. App. 1973, 284 So.2d 24, such submission, even if erroneous, favored appellant. This is so because the state was thereby given the additional task of satisfying the jury as to the materiality issue when the trial judge had determined the testimony to be legally material to the grand jury inquiry by twice denying appellant's motions for judgment of acquittal, which motions were based in part upon the contention that materiality had not been proven.

All of which brings us to the main question involved here: Was the evidence adduced at trial sufficient to show the nature of the inquiry at the time appellant testified before the grand jury? To bring the issue into sharper focus, it seems to us there can be no question that appellant's testimony regarding the date of the employment contract with his wife was quite material to the grand jury inquiry if the subject matter of that inquiry was the manner in which appellant conducted the operation and management of his public office. When testimony is capable of misleading, influencing, or even deterring a grand jury in the conduct of its investigation, it is material. State v. Deets, Iowa 1972, 195 N.W.2d 118. Thus, if the contract was executed in 1969 for a period of five years, as appellant testified in the grand jury proceedings, the employment of his wife in the county comptroller's office would not violate §116.111, F.S. (the anti-nepotism statute), as such employment would have predated the effective date of the statute (January 1, 1970). While the state could certainly have presented a fuller and more complete explanation of the nature of the grand jury's investigation, the total record convinces us the petit jury knew exactly what the grand jury was investigating and was adequately apprised of the subject matter of the investigation so as to determine that appellant's testimony was material thereto.

In its opening statement the state advised the jury that it would prove that at the time in question the Broward County Grand Jury was in the midst of an investigation into alleged improprieties of the appellant's office, including certain employment and payroll practices in that office. The state suggested it would prove appellant's testimony before the grand jury to the effect that he signed an

employment contract with his wife in 1969 was false and was given for the purpose of avoiding prosecution under the anti-nepotism law, which became effective January 1, 1970. It further proposed to prove that the stationery on which the contract was prepared was not printed until after January 1, 1970, since it bore a picture of the new courthouse addition, which picture was not taken until December 1971.

Of course, what counsel says in his opening statement is not evidence and cannot be used in our determination of whether or not the proof was adequate to show the subject matter of the grand jury inquiry. But the opening statement of counsel is important to apprise the jury of the issues involved in the trial and of the matters which he expects to prove. It also facilitates the jury's understanding of the evidence as it unfolds. Moreover, the state did adduce evidence to support the opening statement.

The Forewoman of the Broward County Grand Jury testified she personally placed appellant under oath on September 25, 1973. In addition, she identified the contract between appellant and his wife dated February 4, 1969, as being the one which appellant identified in his testimony before the grand jury. She also stated that appellant's testimony concerned that particular contract which the grand jury became interested in "when we started with the testimony about things in the office, and when we got into this contract the date was important." She stated further that the date was important since appellant had said it was signed in 1969; but if it had been signed after 1970 it would have been in violation of the nepotism law. When the prosecutor asked her:

> "How was that [the date of the contract] important to what the Grand Jury was investigating?"

the witness answered:

> "Well, this was violation of the nepotism law, if it was signed after—I think the date was '70—I am not sure of the month, and by the hiring of his wife and with this contract of 1969 that would have been the grandfather clause, and that would have raised the nepotism law."

Mr. Jenne, the assistant state attorney in charge of the grand jury investigation, testified at trial that the grand jury was "looking into the Comptroller's office. Jack Wheeler was the incumbent responsible for his office." Jenne testified further that they were investigating appellant for nepotism, and appellant's statement to the grand jury precluded any indictment for violation of the nepotism statute because according to appellant's testimony the contract with his wife would predate the statute. Jenne also testified that initially the state attorney's office decided that a full investigation of appellant's office would best be presented to a grand jury. And so when the grand jury began its inquiry, the "areas" of inquiry concerning appellant's office were nepotism, financial records, unlawful overtime payments to certain employees, loan sharking, and other matters of impropriety.

Mr. Butterworth, another assistant state attorney involved in the grand jury probe, testified that three successive grand juries were investigating appellant's office; that they referred to it as the "Wheeler investigation"; that they subpoenaed large quantities of records from

appellant's office; and that they looked into bank records, bonus monies, various trips and other matters involved in appellant's office. There came a time during this investigation, Butterworth stated, when several of the assistant state attorneys discovered that there was a discrepancy between the physical appearance of the courthouse picture on the stationery used for the February 4, 1969 contract in question and the actual physical appearance of the courthouse on that date. The stationery picture portrayed a ten story courthouse, whereas in 1969 the courthouse had only six stories.

It would unduly protract this opinion to further elaborate on the testimony which we find sufficient to prove the subject matter of the grand jury's investigation so as to demonstrate the materiality of appellant's testimony. Suffice it to say that in our judgment the transcript of the trial proceedings shows that the evidence was adequate to prove that issue.

Accordingly, the judgment and sentence appealed from is AFFIRMED.

OWEN, C.J., and BROWN, CECIL H., Associate Judge, concur.

APPENDIX D

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

No. 73-1989 Reasbeck

STATE OF FLORIDA

vs.

JACK R. WHEELER,

Defendant.

[Filed February 19, 1974]

ORDER DENYING DEFENSE MOTIONS

The Court having taken testimony and considered Briefs in connection with Defendant's Motion to Dismiss the Indictment and Motion to Suppress Grand Jury Testimony, given by Defendant on September 25, 1973, finds

That Assistant State Attorney JENNE regarded Defendant JACK WHEELER as a putative Defendant to a charge of Malfeasance but not Perjury when the said Defendant testified on September 25, 1973. For that reason there was no necessity to administer any constitutional warnings to the Defendant at the time of the taking of his Grand Jury testimony.

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress Grand Jury Statement be and the same is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Indictment is also denied, but that the Defendant is hereby granted the right and privilege to hold an evidentiary hearing at any convenient time during the course of the trial, or immediately thereafter, for the purpose of ascertaining whether there were three Assistant State Attorneys present at one time, during the sessions of the Grand Jury which indicted Defendant.

DONE AND ORDERED at Fort Lauderdale, Florida, this 19th day of February, 1974.

/s/ James M. Reasbeck
Circuit Judge

Copies to:

def. atty .
St. Atty.

APPENDIX E

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.